Nos. 11743-11744.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMPLOYERS' FIRE INSURANCE COMPANY, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD and WESTCHESTER FIRE INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUSCONI, as Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, Deceased, FILIPPO RUSCONI, THELMA RUSCONI SMITH, EILLIEN RUSCONI GOODWIN and CHARLES RUSCONI,

Appellees.

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and HARRIET ANN SCOTT,

Appellees.

BRIEF OF APPELLEE.

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NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and HARRIET ANN SCOTT,

Appellees.

BRIEF OF APPELLEE.

Jurisdiction.

(a) This action was filed in the District Court by the individual plaintiffs against the appellee, United States of America, under the Federal Tort Claims Act (28 U. S. C. A. 921). Under Section 931 of the Act, exclusive jurisdiction of said actions is vested in the District Courts. Appellants filed motions to intervene [Tr. 10-21] under Rule 24(a) (the mandatory section), and 24(b) (the

permissive section), and under Rules 17 and 19 (as a real party in interest) of the Federal Rules of Civil Procedure.

The motions were denied by the District Court on the grounds that the Federal Tort Claims Act does not expressly grant consent to suit by a subrogee of a claimant, and that consent of the Government to be sued, being a relinquishment of sovereign immunity, must be strictly interpreted [Tr. 22, 23.]

(b) Of the Circuit Court of Appeals.

The order of the District Court, denying appellants the right to intervene, is a final order so far as appellants are concerned and this Court has jurisdiction over the within matter under Title 28 U. S. C. A. Section 225.

Statement of the Case.

The facts of the case as set forth in Appellants' Brief (pp. 3 to 6) appear to be accurate and are herewith adopted.

Issues.

Appellee contends as follows:

(1) That the District Court did not err in denying appellants' motions to intervene as parties plaintiff;

(2) That the District Court did not err in holding that the Federal Tort Claims Act does not permit suits by subrogees; and

(3) That the District Court did not err in holding that 31 U. S. C., Section 203, which prohibits assignments of claims against the United States is applicable to subrogated claims.

ARGUMENT.

I.

The Order Is Appealable.

A. Appellee agrees that the order of the District Court denying appellants the right to intervene is a final order and this Court has jurisdiction over the within matters under Title 28 U. S. C. A., Section 225.

B. Appellee agrees that the order of the District Court disposes of appellants' rights and that by its express terms is holding that appellants have no right to assert their claims against the Government under the Federal Tort Claims Act.

C. Appellee does not agree that if appellants may not litigate their claims in this action, their rights will be entirely lost.

D. Intervention is not a matter of right under Rule 24(a) or 24(b), Federal Rules of Civil Procedure.

E. Appellee agrees that appellants should have the right to appeal in this case.

F. Appellants are not entitled to intervene under Rule 17 of the Rules of Civil Procedure, 28 U. S. C. A.

II.

Under the Language Used in the Act, Subrogated Claims Are Not Included and Petitioners Were Not Entitled to Intervene.

A. The Pertinent Provisions of the Act.

1. Administrative Settlement of Claims. Section 921 of the Act provides for administrative settlement of claims which do not exceed $1,000.00. The Act confers authority upon the head of each Federal Agency to consider, ascertain, adjust, determine and settle any claim against the United States, for money only * * * where the total amount of the claim does not exceed $1,000.00.

Such authority, so granted to the head of each Federal Agency, merely tends to clarify an already existing authority. Section 921 grants such authority to "the head of *each Federal Agency* (emphasis ours) where prior to the passage of the Act some heads of Federal Agencies had such authority while others did not.

2. Suits on Tort Claims. Section 931 of the Act provides that suit may be brought against the Government in the District Court on all claims whether for more or less than $1,000.00.

> "* * * the United States District Court for the district wherein the plaintiff is resident or wherein the act * * * complained of occurred * * * shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * em-

ployment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * * in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *."

3. Claim Exempted From the Act. Section 943 provides that the provisions of the Act shall not apply to twelve categories of claims. These exceptions are not relevant here.

Procedural matters relating to the Federal Tort Claims Act—including intervention—are governed by Federal and not by State law.

Intervention may not be had under Rule 24(a):

Clause (1) is inapplicable, the appellants' rights to intervene not being unconditionally fixed by statute (and appellants make no claim to any statutory right); and

Clause (2) is also inapplicable, since the appellants' rights do not accrue until plaintiffs recover.

Martin v. Natl. Surety Co., 300 U. S. 588, 57 S. Ct. 531;

Tolliver v. Cudahy, 39 Fed. Supp. 337;

46 *C. J. S. "Insurance,"* Sec. 1215, page 187, n. 24, and page 190, n. 71, 72 and 73.

Clause (3) is inapplicable since there is no property in the custody of the Court.

That the appellants may have a right to intervene *after* the main suit is tried and decided in favor of plaintiffs

(*cf. Oliver v. U. S.*, 156 F. (2d) 281) is obviously not now before the Court.

Intervention may not be had under Rule 24(b):

Clause (1) is inapplicable, as no Federal statute confers any right to intervene;

Clause (2) is inapplicable, since the entire "claim" is that of the plaintiffs, although as to the sums paid by the appellants, plaintiffs would hold any proceeds from the suit as trustees for the appellants *after* receiving such proceeds.

46 *C. J. S.* 187, Sec. 1215, n. 24;

46 *C. J. S.* 190, Sec. 1215, n. 71, 72, 73.

There is nothing "in common" between the claim of plaintiffs against the Government and the claim appellants seek to set up. The entire cause of action for damages against the Government rests in the plaintiffs; it is settled law that the appellants could have no separate action unless, perhaps, they paid the full loss (which it is admitted they did not) or the plaintiffs settled their claim for damages and released the appellees (which has not happened); the only right of action which the appellants will ever have—and one which they do not have now—is to require plaintiffs to pay them at least a proportionate part of what the plaintiffs actually receive as a result of this action, which question of law or fact is not one concerning the appellee or "common" to plaintiffs' claim.

It is respectfully urged that to grant the right to intervene under Rule 24(b)—and appellants can claim no mandatory right under Rule 24(a)—will interject unneces-

sary issues (such as the applicability of Sec. 203, Title 31 U. S. C. A.), which may become the sole issue of an appeal by the appellee, greatly delaying receipt of payment by both the plaintiffs and the appellants under any judgment herein rendered in favor of the plaintiffs.

Rule 17 of the Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), provides in part:

> "(a) Real Party in Interest * * * Every action shall be prosecuted in the name of the real party in interest;" * * *

The Federal Tort Claims Act contemplates suit by the person injured by the negligent act of the Government and refers to the liability of the Government *to the claimant,* which clearly restricts the phrase "any claim" relied on by the appellants, and negatives the right of the fire insurance companies to become plaintiffs at this time by intervention.

Title 28 U. S. C. A., Sec. 931.

The Tort Claims Act does not permit actions on assigned claims—whether by formal assignment or an equitable assignment. Section 411 of the Act (28 U. S. C. A. 932) expressly makes applicable Section 41(20) of Title 28 U. S. C. A.

28 U. S. C. A. 932;

United States v. Crain (1945), 151 F. (2d) 606;

46 C. J. S. 188, Sec. 1215, n. 44 (where claim is unassignable, as here, insurer not proper party plaintiff).

B. The Plain Meaning of the Act.

The Act consents to tort suits against the United States by conferring jurisdiction upon the District Courts to hear, determine and render judgment on *any claim against the United States,* for money only, *on account of damage to,* or loss of property *or on account of* personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.

It appears that the language of the Act confines the grant of jurisdiction to those cases only, which sound in tort, and where money damages are sought by a plaintiff for damage or loss to *his* property or for personal injuries or death.

The Act contemplates suit by the person injured by the negligent act of the Government and refers to the liability of the Government *to the claimant,* which clearly restricts the phrase "any claim" relied upon by the appellants, and negatives the right of the fire insurance companies to become plaintiffs at this time by intervention.

There is no language in the Act that gives consent to suit by a subrogee or assignee, nor is there any language in the Act extending the District Courts' jurisdiction to hear, determine and render judgment against the United States in all kinds of controversies that may be presented in a suit based upon rights derived from the person *who originally* suffered loss and to whom Congress granted the basic right to file suit.

It seems clear that if Congress intended to subject the United States to such litigation it would have said so in language that could not have been misunderstood. The most that can be said for appellants is that they have a

claim for reimbursement against plaintiffs if, as and when plaintiffs recover and are paid, and appellants therefore are not necessary or real parties in interest in the main action.

The Act is one which relaxes sovereign immunity from suit and the well established rule is that statutory language which relaxes this sovereign immunity is strictly construed.

Klamath Indians v. United States, 296 U. S. 244, 250;

Schillinger v. United States, 155 U. S. 163, 166.

C. Under California Law, the Government Would Not Be Liable to Appellants If It Were a Private Individual.

Procedural matters relating to the Federal Tort Claims Act including intervention are governed by Federal and not State law.

III.

The Legislative and Administrative History of the Act Does Not Compel the Conclusion That It Includes Subrogated Claims.

A. Appellants have, in great detail, set forth the administrative history of the Federal Tort Claims Act and have compared it with the Act of March 3, 1887 (10 Stat. 612) commonly referred to as the Tucker Act; with the Admiralty Act (41 Stat. 525; 46 U. S. C. A., Sec. 742); and with the Public Vessels Act (43 Stat. 1112; 46 U. S. C. A., Sec. 781).

Appellants have cited from opinions of the Attorney General of the United States, from the Small Tort Claims Act 42 Stat. 1066; 31 U. S. C. A., Sec. 215, and the Public Vessels Act. From these citations and comparisons

appellants conclude that Congress intended, under the Federal Tort Claims Act, to permit suits by subrogees and assignees.

Appellee submits that it is more reasonable to conclude that when the Federal Tort Claims Act was being considered by the Congress, it had before it all of the history and background cited by appellants, and in all probability, much more. Appellee submits that it can more reasonably be concluded, that with a full history and background before it, had Congress intended to subject the United States to litigation by persons, firms or corporations, not directly involved by the tort committed, it would have said so in language that could not have been misunderstood by adding the words "subrogee," "subrogation," and/or "assignment."

It is the position of the appellee that appellants do not have a substantial right or any interest whatsoever in the subject of the within actions. As indicated above, appellee contends that the Federal Tort Claims Act does not authorize the maintenance of a suit upon a derivative claim, and further, that the Assignment of Claims Act (31 U. S. C., Section 203) forbids the institution of proceedings by a subrogee or assignee.

Appellants' proposed complaint in intervention is based, without question, upon a derivative claim. Appellant seeks to assert the right it acquired by contract with its assured. No matter how appellants seek to dress up their language, the fact still remains that appellants' rights under their agreement with their assured are secondary and not primary. Whatever rights appellants obtained and secured under their agreement were rights that can only be described as subrogation, and/or assignment.

The Federal Tort Claims Act consents to certain tort suits against the United States by conferring jurisdiction upon district courts to hear, determine and render judgment on any claim against the United States, for money only, *"on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government."*

Appellee contends that the aforementioned quoted language of the Act should receive a restrictive interpretation so as to mean "directly or solely on account of."

The said language confines the grant of jurisdiction to those cases only which sound in tort and where money damages are sought by a plaintiff for damage or loss to *his* property or for personal injuries or death. There is no language in the Act that gives consent to suit by a subrogee or assignee, nor is there any language in the Act extending the courts' jurisdiction to hear, determine and render judgment against the United States in all kinds of controversies that may be presented in a suit based upon *rights derived from the person who originally suffered the loss and to whom Congress granted the basic right to file suit.* (Emphasis ours.)

It is further submitted that the Federal Tort Claims Act does not make the United States vicariously liable to *any* person and that the claims of appellants are based upon a theory of liability independent of that established by Section 410(a) of the Federal Tort Claims Act.

Appellants make much of the following language of Section 931. 28 U. S. C. A.

> "Federal District Court has jurisdiction to render judgment on claim where the United States, if a

private person, would be liable to claimant in accordance with the law of the place where the act or omission occurred."

Appellee contends that the aforementioned language should apply only in instances where the Court has jurisdiction over the subject matter and parties. The matter of jurisdiction over the subject matter or the parties is jurisdictional. It is well settled that United States District Courts are courts of *limited* jurisdiction and that no presumption of jurisdiction attaches to such courts. Jurisdiction cannot be conferred upon the Court by consent of the parties where no such jurisdiction has been conferred by Congress. It has been held that the Federal Rules of Civil Procedure do not enlarge the substantive rights against the Government (*United States v. Sherwood,* 312 U. S. 584).

The right to be sued is a substantive right and if there is no right to be sued under the Federal Tort Claims Act, or if the United States of America has not consented to be sued upon a derivative claim, then the question becomes one as to the jurisdiction of the Court to hear and determine the matter. Relinquishment of sovereign immunity from suit must be based upon consent.

United States v. Shaw, 309 U. S. 495 (1940);
Keifer v. R. F. C., 306 U. S. 381 (1939);
Minnesota v. United States, 305 U. S. 382 (1939);
Kansas v. United States, 204 U. S. 331 (1907);
United States v. Lee, 106 U. S. 196 (1882);
United States v. Thompson, 98 U. S. 486 (1878).

Such relinquishment must be strictly interpreted.

United States v. Shaw, 309 U. S. 495 (1940);

United States v. U. S. Fidelity Co., 309 U. S. 506 (1940);

United States v. Michel, 282 U. S. 656 (1931);

Price v. United States, 174 U. S. 373 (1899);

Schillinger v. United States, 155 U. S. 163 (1894).

Any statutory language which relaxes sovereign immunity from suit must be strictly construed.

Klamath Indians v. United States, 296 U. S. 244, 250;

Schillinger v. United States, 155 U. S. 163, 166.

In *Klamath Indians v. United States, supra,* the Court said at page 250:

> "* * * the Act grants a special privilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms."

The appellants' proposed action is based on the theory of subrogation. The appellants themselves have no direct claim or right against appellee independent of their relationship with their assured. It is submitted that there is no distinction between a subrogee or assignee, and the rights of a subrogee are no greater than those of an assignee insofar as the Federal Assignment of Claims Act is concerned (31 U. S. C. Sec. 203; *Offer v. Superior Court,* 194 Cal. 114, 228 Pac. 11).

Appellants' cited authorities do not support their position.

Offer v. Superior Court, 194 Cal. 114, 228 Pac. 11, and *Fairbanks v. S. F. Ry.,* 115 Cal. 579, 47 Pac. 450, contain *dicta* which, if a correct statement of the law in California, are inapplicable for the reasons set forth above.

U. S. F. & G. Co. etc. v. U. S., 56 Fed. Supp. 452, involved a claim under the Longshoremen's Compensation Act (33 U. S. C. A. 901 *et seq.*), which by Section 933(i) thereof expressly provides for subrogation, and provides for assignment by Section 933(c). Consequently Title 31 U. S. C. A., Section 203, was not mentioned or involved. Finally, Congress gave express consent that the United States may be sued (46 U. S. C. A. 742, 743). Furthermore, the Federal Rules do not apply to Admiralty. In Admiralty, incidentally, or in a suit in equity, the subrogee may sue in its own name (*Phoenix v. Erie,* 117 U. S. 321), but the instant case is one at law.

Englehardt v. U. S., 69 Fed. Supp. 451, involved the joinder of two joint tort-feasors as defendants, the Government insisting upon such joinder.

Sloan v. Appalachian Elec. Co., 27 Fed. Supp. 108, was an action between private parties under a state law (Workmen's Compensation Act) expressly providing for subrogation and falling clearly within Clause (1) of both Rule 24(a) and 24(b).

Williams v. Powers, 2 F. R. D. 361, was also an action between private parties, and both the defendant and the insurer moved to make the insurer a party-plaintiff as a real party in interest under state laws which had such effect as regards a contract of indemnity. As shown above, a different rule is generally applicable to *fire* insurance.

Morgenthau v. Fidelity & Dep. Co., 94 F. (2d) 632, holding Section 203, Title 31 U. S. C., inapplicable where

surety under contractor's bond in favor of the Government paid laborers and materialmen *and* claim and voucher therefor were approved—circumstances not present at this time.

It is therefore respectfully submitted that the orders of the District Court should be sustained and appellants not be permitted to file their complaints in intervention.

Dated: Los Angeles, California, January 14, 1948.

Respectfully submitted,

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We concur in and adopt this brief filed on behalf of appellee, United States of America, as the brief of appellees Charles Rusconi, *et al.,* and Elizabeth Hart Scott and Harriet Ann Scott.

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